80-1158

Supreme Court, U. S.
FILED
DEC 26 1980
MICHAEL RODAK, JR., CLERK

NO.

in the
Supreme Court
of the
United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

DAMASCO VINCENTE RODRIGUEZ,
Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal
of Florida, Third District

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128
(305) 377-5441
Attorneys for Petitioner

Of Counsel: JANET RENO
State Attorney

IRA LOEWY
Assistant State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AND FIFTH AMENDMENTS AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION HOLDING: 1) THAT A POLICEMAN HAS LESS OF A RIGHT THAN THE GENERAL PUBLIC TO APPROACH PERSONS ON THE STREET; 2) THAT THE FACTS HEREIN, THEREFORE, CONSTITUTE A STOP AND FURTHER THE FACTS DO NOT AMOUNT TO ARTICULABLE SUSPICION AND 3) THAT THE CONSENT TO OPEN THE DEFENDANT'S LUGGAGE WAS ILLEGAL BECAUSE HE WAS NOT WARNED HE HAD A RIGHT TO REFUSE THE SEARCH, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN *UNITED STATES v. MENDENHALL, U.S.*, 100 S.Ct. 1870 (1980); *SCHNECKLOTH v. BUSTAMONTE*, 412 U.S. 218 (1973) AND *TERRY v. OHIO*, 392 U.S. 1 (1968)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
PREFACE	vi
OPINIONS BELOW	vii
JURISDICTION	viii
CONSTITUTIONAL AND STATUTORY PROVISIONS	xi
STATEMENT OF THE CASE	1-11
SUMMARY OF ARGUMENT	11
ARGUMENT	11-22
CONCLUSION	23

TABLE OF CITATIONS

UNITED STATES CASES	Page
Adams v. Williams, 407 U.S. 143 (1972)	21
Delaware v. Prouse, _____ U.S. _____, 99 S. Ct. 1591 (1979)	20, 21
Draper v. United States, 358 U.S. 307 (1959)	12
Reid v. Georgia, _____ U.S. _____, 100 S.Ct. 2752 (1980)	11
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	i, 11
Stone v. Powell, 428 U.S. 465 (1976)	22, 23
Terry v. Ohio, 392 U.S. 1 (1968)	i, 11, 12, 13, 14, 19
United States v. Mendenhall, ___ U.S. ___, 100 S.Ct. 1870 (1980)	i, 11, 12, 14, 17, 18, 21, 23

UNITED STATES CONSTITUTION	
Amendments IV, V and XIV	vii, ix

UNITED STATES CODE	
28 U.S.C. §1257(3)	viii

TABLE OF CITATIONS (Continued)

Page

OTHER AUTHORITIES

Carpenter v. Sigler,
419 F.2d 169 (8th Cir. 1969) 12

Dodi Publishing Co. v. Editorial America, S.A.,
385 So.2d 1369 (Fla. 1980) viii

Hetland v. State,
366 So.2d 831 (Fla. 2d DCA 1979) viii

Jenkins v. State,
385 So.2d 1351 (Fla. 1980) viii

Royer v. State,
389 So.2d 1008 (Fla. 3d DCA 1980) 17, 19

State v. Battleman,
374 So.2d 636 (Fla. 3d DCA 1979) 10

State v. Frost,
374 So.2d 593 (Fla. 3d DCA 1979) 14

State v. Wise,
356 So.2d 920 (Fla. 2d DCA 1978) 18

Wilson v. Porter,
361 F.2d 412 (9th Cir. 1966) 12

United States v. Coleman,
450 F.Supp. 433 (E.D. Mich. 1979) 14

TABLE OF CITATIONS (Continued)

Page

United States v. Elmore,
595 F.2d 1036 (5th Cir. 1979) 17

United States v. Fry,
622 F.2d 1218 (5th Cir. 1980) 17

United States v. Garcia,
450 F.Supp. 1020 (E.D.N.Y. 1978) 20

United States v. Pope,
561 F.2d 663 (6th Cir. 1977) 19

United States v. Price,
599 F.2d 494 (2d Cir. 1979) 20

United States v. Vasquez-Santiago,
601 F.2d 1069 (2d Cir. 1979) 20

United States v. Williams,
622 F.2d 80 (5th Cir. 1980), en banc 21, 22, 23

United States v. Wylie,
569 F.2d 62 (D.C. Cir. 1977) 12

PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Appellant in the District Court of Appeal of Florida, Third District, and the prosecution in the Florida trial court. The Respondent, DAMASCO VINCENTE RODRIGUEZ, was the Appellee in the Florida District Court and the defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references are made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of page A1-A69.

I.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, affirming the Florida trial court's granting of the Defendant's Motion to Suppress has been stayed pending an appeal to this Court. The Florida District Court opinion will be reported in *Southern Reporter Second Series* (West 1981). The opinion of the Florida District Court is contained in the State's Appendix at A64., There is no official reporter for citation to this opinion.

II.

JURISDICTION

On October 27, 1980, the District Court of Appeal of Florida, Third District, denied the State's Petition for Rehearing. The Florida District Court, however, stayed its mandate for sixty (60) days pending an appeal to this Honorable Court. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV, V and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. *Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979), *approved and adopted, Hetland v. State*, 387 So.2d 963 (Fla. 1980). The Florida District Court *per curiam* opinion, makes the Florida District Court the Court of last resort herein as a matter of law. *See, Dodi Publishing Co. v. Editorial America S.A.*, 385 So.2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V of the Constitution of the United States provides *inter alia* that:

> "[No person] shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NO.

in the
Supreme Court
of the
United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

DAMASCO VINCENTE RODRIGUEZ,
Respondent.

IV.

STATEMENT OF THE CASE

The Defendant, Damasco Vincente Rodriguez, was charged by information with possession of cocaine with intent to distribute arising out of his attempt on September 12, 1978, to transport three (3) pounds of cocaine contained in his luggage, through Miami International Airport, Miami, Florida. The Defendant

filed two Motions to Suppress in which the Defendant claimed his Fourth, Fifth and Fourteenth Amendment rights under the United States Constitution were violated. *See*, A2-A6. After an evidentiary hearing, the Florida trial court granted the Defendant's motions. A62-63.

At the hearing upon the Motion to Suppress, the only witness who testified was Officer Charles McGee of the Dade County Public Safety Department. A9. McGee related that he first saw the Defendant at 12:40 P.M. on September 12, 1978, at National Airlines ticket counter. A10. The Defendant was standing in line with a soft vinyl suitcase and a gold plastic suitbag with zippers which were padlocked shut. A22. Officer McGee observed that the Defendant did not buy a ticket but instead trailed two other individuals, subsequently known as Ramirez and Blanco. A24. Ramirez had purchased a ticket with a large roll of cash. A23. Ramirez upon purchasing a ticket walked over to Blanco and whispered to Blanco, who then walked by the Defendant and whispered to him. A24-A27. As Ramirez walked out of the ticket area past the Defendant and Blanco, he did not look at them. A26.

As Ramirez reached the end of the roped-off ticket purchasing area, Blanco left the ticket line and walked out behind Ramirez. A26. Blanco then looked quickly from side to side as well as behind him and the Defendant left the ticket line and followed behind Ramirez and Blanco. A26. During that time, neither Blanco nor the defendant conducted a transaction at the ticket counter. A27. Officer McGee and his partner, Facchiano, then followed the three men to the National Airline's departure area where they proceeded onto an escalator. A28. On the escalator, Ramirez and Blanco were standing side-

by-side, the Defendant was directly behind them, and McGee and his partner were four steps further back. A28. While on the escalator, Blanco and Ramirez conversed between themselves but not with the Defendant. A29. At the top of the escalator, as Blanco looked back toward the Defendant, he made eye contact with McGee. A29. Blanco then turned quickly back to Ramirez and spoke briefly with him and Ramirez then quickly looked back at the officers. A30. As the three men stepped off the escalator, Blanco turned and said to the Defendant, "Let's get out of here." A31. The Defendant then stopped and Blanco repeated "in a much lower and strained voice, 'Get out of here.'" A32.

At this point, the Defendant then turned, with suitcases still in hand, and looked directly at McGee. A32. The Defendant immediately started moving in a very hurried fashion to his left. A32. McGee described the Defendant's actions in the following manner:

> "THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place. You might say moving slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.
>
> THE COURT: Did he run or walk?
>
> THE WITNESS: Neither. He was pumping up and down.

THE COURT: You said he ran up a minute ago. Did he go from a walk to pumping to a run?

THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time.

Do you understand what I'm saying?

BY MS. COHAN:

Q. Detective McGee, can you come down from the witness stand and show us?

THE COURT: Like running in place?

THE WITNESS: Sort of like this (indicating).

To demonstrate, he was standing with his suitcase and shoulder bag when the guy told him in a strained tone to get out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet was going up and down and he was moving, but —

THE COURT: All right. Have a seat."
A33.

The Defendant's comical attempt to flee the officers continued thus:

"[THE WITNESS]: After Mr. Rodriguez moved to the left to that position where the wall was, he started to go around it looking into that area. There is no exit, just walls. He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

THE COURT" Maybe that's the way he walks.

THE WITNESS: He ran to the right and went that way. He ran back and got right in front of me. He looked at me square in the face. He said, 'Oh, shit.' "

A34.

While the Defendant was engaged in this activity, Blanco and Ramirez were standing off to the side. A36. When the Defendant passed by Blanco for the second time, Blanco told the Defendant to "go check the bag." A36. The Defendant then stopped in front of Officer McGee and said, "Oh, shit." A37. McGee then identified himself and asked if he could speak to the Defendant for a moment and the Defendant said, yes, sir." A39. McGee then asked if the Defendant would mind walking over to where his friends were with the other officer and the Defendant turned and proceeded the short distance. A40-A44.

After the Defendant rejoined the other two men, McGee asked if he had any identification and an airline ticket. A44. While the Defendant said that he had

none, Ramirez handed McGee a National Airlines ticket to LaGuardia in the names of Martinez, Perez and Rodriguez. A44. A discussion then ensued during which both the Defendant and Blanco stated that they were Rodriguez. A44. After the discussions concerning identification, McGee and his partner indicated that they were narcotics officers who were assigned to seek to combat the problem of drug trafficking through the airport. A46. After this advisement, the following ensued:

> I made some statement to Mr. Rodriguez about the display of his movements upon coming off of the escalator. I advised him that it caused me some concern from my observations and I asked him at that time, "So would you have any objection if I searched your luggage?"
>
> He said, "I don't."
>
> The suitcase was down on the floor. I am pointing down to the suitcase. He says, "I don't have a key."
>
> Before I could say anything else, Ramirez was watching me at that point and Ramirez said to Rodriguez, "Let him look."
>
> Rodriguez reached in his pocket and extracted a key. It was loose. It wasn't on a key chain or anything. He handed me a key which I placed in the lock and opened it.
>
> Q Did you demand that Mr. Rodriguez consent to search of his luggage?

A No, ma'am. I asked him if he had any objections. He said, "I don't have a key."

Q Did you tell him anything such as he didn't have a choice in the matter?

A No, ma'am."

A51-52.

McGee took the key, opened the suitcase, and found three-and-one half pounds of cocaine. A53. The Defendant was then arrested and handcuffed. A54. Prior to the discovery of the cocaine, the Defendant was free to leave. A55. After the Defendant was advised of his Miranda rights, he stated, "It's my dope. I am not going to get those other guys involved." A57.

The only evidence presented below was the unrebutted testimony of Officer McGee. Upon the foregoing facts the prosecutor argued in vain that the transaction was a mere contact within the meaning of *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977), and *Terry v. Ohio*, 392 U.S. 1 (1968) and that the Defendant's consent was valid under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). A58-A60. Upon the testimony of Officer McGee, the Florida trial court made three (3) distinct rulings. First, during the hearing, with respect to the approach by the officers, the trial court opined, thus:

"MS. COHAN: Your honor, this officer as a police officer has no less right to go up and engage a citizen in voluntary conversation than does a Hare Krishna.

THE COURT: I think he does have less right because his work and his duties and responsibilities and what he is attempting to do are entirely different than that of an ordinary citizen.

MS. COHAN: Not at all.

THE COURT: Well, I disagree with you. Go ahead. I am not going to permit that answer, anyway."

MS. COHAN: Your Honor is apparently taking the position that he has less right than a normal citizen. The State does not take that position and I would also at this point object to not being able to inquire as to those matters.

THE COURT: It's in the record."

A18-A20.

Subsequently, with regard to the bizarre activity of the Defendant; the whispering and apparently furtive relationship of the three men, the trial court made its position clear:

"THE COURT: I could rule at this point there was no reason to stop this man and for the sake of argument. I am not determining as a matter of fact at this point, but for the sake of argument I could say it was an illegal stop and there was no probable cause for an articulable fact or reasonable founded suspicion to stop this man, but that still doesn't visciate

necessarily what occurred thereafter. So, let's go from that point."

A49.

Finally, with respect to the Defendant's consent to search the bag, the trial court granted the Defendant's Motions to Suppress holding that:

> "THE COURT: I am going to grant the motion for this reason: I do not think that there has been a sufficient showing by the State that the consent was completely untainted and freely and voluntarily given; that the defendant was never told that he had the right to leave. He was never told that. He had the right to refuse to have his baggage searched and that he never verbalized a consent to the search of his luggage. I do not believe that the intervening statement by a companion to let him look is sufficient in the time frame that occurred here to overcome the taint of the lack of showing that his man had a right to refuse the search of his luggage or he had a right to leave, and therefore under the totality of the circumstances, I am going to grant the motion."

A60-A61.

Apparently, under the Florida trial court's view, the State is charged with not only the conduct of its officers, but must also be responsible for remarks of co-defendants. The trial court's written order similarly provides as a matter of law relying upon the United States Constitution that:

"1. There was no reason to stop the Defendant, Damasco Vincente Rodriguez. The Defendant did nothing which would arouse an articulable suspicion in the eyes of Detective McGee and Detective Facchiano.

"2. Due to the lack of telling the Defendant he had a right to leave, and the lack of telling the Defendant he had a right to refuse to consent to a search, there was an insufficient showing that the consent herein was completely untainted due to the lack of the two things previously mentioned.

"3. The statement made by the Defendant's companion did not overcome the taint from the initial illegal stop of the Defendant."

A62-A63.

On appeal to the District Court of Appeal of Florida, Third District, the State specifically relied upon this court's recent decision in *United States v. Mendenhall*, _____ *U.S.* _____, *100 S.Ct. 1870 (1980). A64. The Florida District Court disposed of all issues summarily holding that:*

"PER CURIAM.

"Affirmed on the authority of State v. Battleman, 374 So.2d 66 (Fla. 3d DCA 1979)."

A65.

The State filed a petition for rehearing, which was subsequently denied. A66-A69. The mandate of the

Florida District Court has been stayed pending appeal to this Court. A70.

V.

SUMMARY OF ARGUMENT

The decision of the Florida courts, construing the Fourth and Fifth Amendments of the United States Constitution holding: 1) that a a policeman has less of a right than the general public to approach persons on the street; 2) that the facts herein, therefore, constitute a stop and further the facts do not amount to articulable suspicion and 3) that the consent to open the Defendant's luggage was illegal because he was not warned he had a right to refuse the search, is in direct and substantial conflict with the rule of this Court in *United States v. Mendenhall*, _ U.S. _, 100 S.Ct. 1870 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Terry v. Ohio*, 392 U.S. 1 (1968). In view of this Court's recent decisions in *Mendenhall* and *Reid v. Georgia*, ___ U.S. ___, 100 S.Ct. 2752 (1980) leaving the present issues in a state of some confusion, this Honorable court should correct this gross mis-construction of the United States Constitution.

VI.

ARGUMENT

The decision of the Florida Courts cannot be reconciled with the decisions of this Court in *United States v. Mendenhall*, ___ U.S. ___, 100 S.Ct. 1870 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968) and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The State submits

that in the circumstances of the case at bar, the initial transaction herein was not prohibited by the Fourth and fourteenth Amendments but was a mere "contact" between a police officer in a position that he had a right to be in and a citizen on the street. Alternatively, the circumstances herein clearly established articulable suspicion as a matter of law. *See, Draper v. United States*, 358 U.S. 307 (1959). Under *Terry v. Ohio, supra*, and its progeny, a police officer may approach a citizen for three separate reasons: 1) arrest; 2) stop and investigation and 3) mere contact. *See, e.g., United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969); *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966); *see also, United States v. Mendenhall.* The predicate for each of these categories is different; as are the consequences. In order to justify an arrest, there must exist probable cause to believe that a crime has been committed and that the defendant committed it. In order to justify a *stop and detention*, the police must be able to articulate an objective, reasonable basis for belief that a crime has been, will be, or is currently being committed. *Terry v. Ohio, supra.* Such a stop gives the police the power to detain a citizen against his will for the limited purpose of investigation. The third form of approach, a mere *contact*, is directly applicable in the case at bar, and consists of simple common sense. *See, Terry v. Ohio, United States v. Mendenhall; United States v. Wylie.* In a mere *contact* the officer may not detain a citizen at all. He has only a common right to engage in voluntary conversation and if the citizen does not wish to respond, he need not, and may simply walk away. *See, e.g., United States v. Wylie*, at 67. This natural, common sense conclusion is predicated upon the fact that ordinary threshhold discourse between police officers and citizens on the

street is not cause for constitutional alarm. *Terry v. Ohio; United States v. Mendenhall.*

In *Terry v. Ohio,* the court, through Justice Warren, stated the applicable standards herein thus:

> "It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusion short of arrest."
>
> *Id.* at 26.

The court in *Terry* recognized that for the purpose of the Fourth Amendment, an "arrest and search" and a "stop" are to be considered "seizures." However, the court recognized that:

> "[N]ot all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the Officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred."
>
> *Id.* at 19, n. 16.

Mr. Justice Harlan in his concurring opinion specifically recognized that the right of a police officer to address questions to other persons is a right possessed by every citizen, co-existing with the *equal* right of the

person addressed to ignore his interrogator and walk away. 392 U.S., supra, at 32,33. Further, in the concurring opinion of Mr. Justice White, it is stated:

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."
>
> *Id.* at 34.

In the case at bar, consistent with the mandate of *Terry v. Ohio, supra*, there is *no testimony* that the Respondent did anything other than to voluntarily cooperate with the officers and voluntarily provide the officers with access and did consent to an examination of his luggage. There is no testimony but that the officers merely approached and contacted a citizen on the street. The Florida Court's rule under the guise of the United States Constitution that police officers have less rights than those of citizens to approach persons on the street is utterly erroneous. *See, also, State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) (Schwartz, J.: expressing an "attraction" to the line of reasoning in *United States v. Coleman*, 450 F.Supp. 433 (E.D. Mich. 1979), which holds that as soon as an officer initially approaches anyone on the street or in a public area it is a "stop" within the meaning of the United States Constitution). In *United States v. Mendenhall*, the court recites preliminary facts virtually identical to those herein as *not tantamount to a seizure:*

> *"We adhere to the view that a person is "seized" only when by means of physical force of a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever*

for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116.

"On the facts of this case, no "seizure" of the respondent occurred. [1] The events took place in the public concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence, [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. *Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket, and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.* See Terry v. Ohio, supra, 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1885 (Harlan, J., concurring). See also A.L.I., Model Code of Pre-Arraignment Procedure §110.1(1) and commentary at 257-261. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agent's initial approach to her was not a seizure.

"Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate

with their inquiry, for the voluntariness of her responses do not depend upon her having been so informed. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854. *We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents's questions.* It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protecteive, but rather whether it was made voluntarily.

"The Court's decision last Term in Brown v. Texas. 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed. 2d 357, *on which the respondent relies, is not apposite.* It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. *In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him,"* id., at 49, 99 S.Ct., at 2639. *UP TO THIS POINT THERE WAS NO SEIZURE.* But after continuing to protest, the officer's power to interrogate him, Brown was first frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer 'who has lawfully stopped him and requested the information.' " [Emphasis added].

100 S.Ct. at 1877-1878.

In the case at bar, *as in Mendenhall,* the events herein 1) took place upon a public concourse; 2) the

officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant; 4) but instead the officers approached him and identified themselves; 5) requested but did not demand the Defendant's identification and ticket and 6) the officer's posed a few questions, *the primary of which was the bizarre conduct of the Defendant at the mere sight of the officers.* These circumstances do *not* amount to a "stop" within the meaning of the United States Constitution. *Terry v. Ohio; United States v. Mendenhall; see also, United States v. Fry,* 622 F.2d 1218 (5th Cir. 1980); *United States v. Elmore,* 595 F.2d 1036 (5th Cir. 1979)[1].

Furthermore, that the Defendant silently acquiesced in response to a suggestion by a co-defendant that he let the officers look in the bag is also without constitutional significance. As this Court explained in *Mendenhall:*

> "The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, and is a matter which the government has the burden of proving.

---

[1]In a rather strongly worded opinion, the Florida Third District Court of Appeal in *Frost* has *rejected* the views of the Fifth Circuit Court in *Elmore* as to the application of the United States Constitution to airport transactions. *See, also, Royer v. State,* 389 So.2d 1007 (Fla. 3d DCA 1980) (*en banc,* taking the position that *Reid v. Georgia,* U.S. , 100 S.Ct. 2752 (1980) is contrary to *Mendenhall* and that under *Reid* all "profile" transactions are unreasonable under the Fourth Amendment no matter what the actual observed facts are).

> Id., at 222, 93 S.Ct., at 2045, citing Bumper v. North Carolina, 391 U.S. 543, 548 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797. *The respondent herself did not testify at the hearing. The Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers." [Emphasis added].*
>
> *Id.* at 1879.

As in *Mendenhall*, in the case at bar, the State's evidence was *unrefuted*. The Defendant did *not* testify. The only evidence was that the officers *asked* if he would permit them to look in the bag. That the State is somehow responsible for the urgings of the Defendant's partner-in-crime, who suggested he let the officers look, is a travesty of justice and a gross misreading of the requirements of the United States Constitution. See, *Schneckloth*, *Mendenhall*. Furthermore, as this Court noted in *Mendenhall*, there is no requirement under the Constitution that the Defendant be given some sort of Miranda-like warning prior to a valid consent. *See, also, State v. Wise*, 356 So.2d 920 (Fla. 2d DCA 1978). The Florida courts reading of the United States Constitution to the contrary, is utterly erroneous.

Finally, the Florida courts absolute rejection to the facts herein as *not* amounting to articulable suspicion within the meaning of the Fourth Amendment is utterly erroneous. The failure of the Florida courts to properly

apply this Court's recent decisions in *Reid* and *Mendenhall* is emblematic of their failure to properly apply *Terry v. Ohio*, in the airport context. *See*, *Royer v. State*, 389 So.2d 1007 (Fla. 3d DCA 1980)(discussed at footnote 1, *supra*). Where the officers are suspicious of an individual because of the profile characteristics, they may conduct a valid investigatory stop when they are "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *United States v. Pope*, 561 F.2d 663, 667 (6th Cir. 1977) *citing Terry v. Ohio*, 392 U.S. 1 at 27 (1968); *Mendenhall*. The officers herein did not stop the Defendant and his associates until they had plainly observed conduct which furnished "reasonable suspicion." In the officer's initial observations, the Defendant and his companions were acting peculiarly. When Blanco made eye contact with McGee on the escalator, this caused Blanco to whisper to Ramirez, who immediately turned to look at the officers. As the three men exited the escalator, Blanco turned and told the Defendant, "Let's get out of here." When the Defendant stopped, Blanco repeated, "Get out of here[,]" causing the Defendant to turn, with suitcases in hand, and look at McGee. The Defendant then started trying to leave the area by scrambling around like the proverbial headless chicken. All of this activity subsided when the Defendant ran back in front of McGee, looked him square in the face, and stated, "Oh, shit." That this behavior furnished the articulable facts necessary to create reasonable suspicion for an investigative stop cannot seriously be gainsaid. Indeed the State submits that the false identity by the Defendant's companion when asked who he was, together with the Defendant's falsehood about whether or not he had a key, only

substantiated the experienced observations of these narcotics officers.

Along each carefully defined step, from initial observation to investigative stop, the officers' conduct was completely in compliance with the applicable legal requirements. *See, United States v. Vasquez-Santiago,* 601 F.2d 1069 (2d Cir. 1979). The meshing of practical police considerations and Fourth Amendment theory is stated by this Court in *Delaware v. Prouse,* U.S. , 99 S.Ct. 1391, 1396 (1979):

> "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasio[n] . . . ' " Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based by capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test."
>
> [Citations and footnotes omitted].

See, also, United States v. Price, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Garcia,* 450 F.Supp. 1020

(E.D.N.Y. 1978). Similarly, in *Adams v. Williams*, 407 U.S. 143 (1972), this Court explained:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. See id., at 23, 88 S.Ct., at 1881. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [citations omitted]".
>
> *Id.*, at 145-146.

The Florida courts under the guise of the Fourth Amendment have abrogated the properly application of the Fourth Amendment explained by both *Terry v. Ohio* and *Adams v. Williams*. The Florida courts, in applying the Fourth Amendment to the airport context herein, have failed utterly to apply the balancing test explained by this Court in *Delaware v. Prouse*, and as exemplified in *Mendenhall*. *See, also, United States v. Williams*, 622 F.2d 80 (5th Cir. 1980), *en banc*. The officers herein simply responded in good faith to the obvious circumstances, which they observed as trained narcotics investigators. The application of the exclusionary rule to the good faith actions of these officers is nonsensical and contrary to any intended purpose under the United

States Constitution. *See, United States v. Williams, supra; see also, Stone v. Powell*, 428 U.S. 465, 496-516 (1976) (Burger, J. concurring). Where the exclusionary rule has served its purpose it should not be extended now such that all it serves to do is to frustrate the interdiction of narcotics traffic. *See, Stone v. Powell; Williams, supra.*

CONCLUSION

The officers herein were in good faith and therefore the cocaine should *not* have been suppressed where its suppression only serves to frustrate the interdiction of chronic narcotics traffic. *See, United States v. Williams, supra.* Illicit narcotics traffic is a insidious cancer eating at the very fabric of our society. It is clear that narcotics traffic presents a clear and present danger to the underlying fabric of this nation. Certainly, illicit narcotics traffic has an embarrassing and substantial impact *when the notoriety of MIAMI as a drug terminal is judicially acknowledged in the Supreme Court of the United States. See,* 100 S.Ct. at 1881 (Powell, Burger and Blackmun, J.J., *concurring*). The "serbonian bog" of the exclusionary rule should not be extended to the present circumstance. *See, Stone v. Powell; United States v. Williams.*

The failure of the Florida courts herein to even consider a balancing test, patently exceeds the bounds of the United States Constitution. In view of the circumstances of the Florida Courts opinion and in view of *Mendenhall* and *Reid,* this Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

RESPECTFULLY SUBMITTED, on this _____ day of December, 1980, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

80-1158

Supreme Court, U.S.
FILED
DEC 26 1980
MICHAEL RODAK, JR., CLERK

NO.

in the Supreme Court of the United States

THE STATE OF FLORIDA,
Petitioner,

vs.

DAMASCO VINCENTE RODRIGUEZ,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

APPENDIX TO BRIEF OF PETITIONER

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128
(305) 377-5441
Attorneys for Petitioner

Of Counsel: JANET RENO
State Attorney

IRA LOEWY
Assistant State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

INDEX TO APPENDIX

Document		Page
1.	Motion to Suppress Evidence	2-4
2.	Motion to Suppress Confession	5-6
3.	EXCERPT OF Hearing upon Motions to Suppress	7-61
4.	Order upon Motions to Suppress	62-A63
5.	Notice of Additional Authority	64
6.	Opinion of District Court of Appeal of Florida, Third District	65
7.	Motion for Rehearing	66-68
8.	Order denying Rehearing	69
9.	Order Granting Stay	70

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

CASE NO: 78-13968

THE STATE OF FLORIDA

Plaintiff,

vs.

DAMASCO RODRIGUEZ,

Defendant.

MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH UNREASONABLE SEARCH AND SEIZURE

COMES NOW the defendant, DEMASCO RODRIGUEZ, by and through his undersigned counsel and respectfully moves this Court pursuant to rule 3.190 (h) of the Florida Rules of Criminal Procedure, for an order to supress the following evidence obtained unlawfully as the result of an illegal search and seizure: Approximately three pounds of a white powdery substance purported to be Cocaine.

In support of the foregoing motion the defendant would state as follows:

1. The purported Cocaine referred to the above was illegally seized without a warrant. (Rule 3.190 (h) (1), of the Florida Rule of Criminal Procedure).

2. The facts upon which this motion is based are as follows:

> On September 12, 1978, approximately 12:30 p.m., Mr. Demasco Rodriguez entered the Miami International Airport with two other persons, one of whom purchased a ticket for Mr. Rodriguez to take National Airlines Flight 136 to New York LaGuardia Airport which was scheduled to depart on September 12, 1978, at 1:00 p.m., Mr. Rodriguez at this time had in his possession a soft leather samsonite suitcase. There was nothing unusual or remarkable about this samsonite suitcase. While standing in the appropriate line to check in his suitcase, Mr. Rodriguez was approached by Detective J. Facchiano, of the Public Safety Department. At this time, Detective J. Facchiano, demanded that Mr. Rodriguez open the relevant samsonite suitcase. Thereupon, Mr. Rodriguez merely acquiesced to the legal authority of Det. Facchiano, who thereupon, opened said suitcase without Mr. Rodriguez freely and voluntarily consenting to this search. Upon opening said suitcase, Detective J. Facchiano discovered the substance here in issue.

3. The Defendant respectfully submits that the initial stop by a member of the Public Safety Department and the search and seizure which followed were unlawful and in violation of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article I Section II of the Florida Constitution and the recent Florida Supreme Court case of *Coladonato v. State* 348 So. 2nd 326 (1978).

4. That the Defendant never freely and voluntarily consented to the search of the relevant suitcase and that he merely acquiesced to the apparent lawful authority of Detective J. Facchiano who demanded that the defendant open his suitcase. See, *United States v. Rodriguez* 525 F. 2nd 1313 (10th Cir. 1975), *Brown v. State* 330 So. 2nd 861 (4th DCA 1976), *Barley v. State* 319 So 2nd 22 (1975), *Powell v. State* 332 So. 2nd 105 (1DCA 1976).

5. The Defendant submits that there was no probable cause to support the issuance of a search warrant in the instant cause as required by Florida Statute 933.06.

6. The Defendant submits that the purported "drug profile" which may have been used in the instant case of of doubtful validity, especially in light of the fact in this case which did not support a finding or probable cause for the initial stop or detention, and certainly do not support a finding or probable cause required for the search and seizure and arrest which have taken place in this case.

WHEREFORE, for good cause shown and based on the above and further based upon the attached memorandum of law and facts applicable to this case, the defendant respectfully moves this Honorable Court to enter an order granting his motion to supress the illegally seized evidence in the instant cause.

[FILED '79 JAN 11]

IN THE CIRCUIT COURT OF THE ELEVENTH JULICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

CASE NO: 78-13968
(Judge Richard S. Hickey)

STATE OF FLORIDA

Plaintiff,

vs.

DEMISCO RODRIGUEZ,

Defendant.

MOTION TO SUPPRESS DEFENDANT'S CONFESSIONS, ADMISSIONS AND STATEMENTS

THE DEFENDANT, by and through his undersigned counsel, respectfully moves this Honorable Court to suppress as evidence at the time of trial in the above-styled cause all written and oral statements made by the Defendant to the police or other agents of the State or the State of Florida pursuant to Rule 3.190(i), Florida Rules of Criminal Procedure and as grounds states as follows:

1. The written and oral statements were obtained from the Defendant in violation of the Defendant's rights to counsel and the Defendant's privilege against self-incrimination guaranteed by the Fifth, Sixth and the Due Process Clause of the Fourteenth Amendment

to the United States Constitution as interpreted by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

2. The written and oral statements from the Defendant were not freely and voluntarily given, in violation of the Defendant's rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution (1968).

3. The written and oral statements were obtained from the Defendant in violation of the Defendant's right to be free of unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution and by Article I, Section 12 of the Florida Constitution (1968). *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *Bethancourt v. State*, 224 So.2d 378 (3rd D.C.A. 1969); *French v. State*, 198 So.2d 668 (3rd D.C.A. Fla. 1967).

4. The written and oral statements were obtained from the Defendant in violation of *Florida Statute* Section 901.06 and Section 901.23. *Oliver v. State*, 250 So.2d 888 (Fla. 1971); *Jacobs v. State*, 248 So.2d 48 (1st D.C.A. 1971).

5. The written and oral statements obtained from the Defendant are not supported by an independent prima facie proof of the corpus delecti of the crime for which the Defendant is charged.

[FILED '79 JUN 29]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 78-13968

STATE OF FLORIDA,

vs.

DAMASCO V. RODRIGUEZ,
Defendant.

Metropolitan Justice Building
Miami, Florida
Thursday, 10:00 a.m.
May 10, 1979

THIS MATTER came on for hearing before the Honorable RICHARD S. HICKEY, Circuit Court Judge, Criminal Division, pursuant to Notice.

APPEARANCES:

JANET RENO, STATE ATTORNEY
By: RINA COHAN, ASSISTANT STATE ATTORNEY
ON BEHALF OF THE STATE OF FLORIDA.

JEFFERY WIENER, ESQ.,
ON BEHALF OF THE DEFENDANT.

THEREUPON:

THE COURT: There is no showing that he is hostile at this time. You have to take that up at the proper time.

MR. WIENER: Your Honor, he is.

THE COURT: You have no right to ask leading questions on your direct examination unless you can show that he is hostile. If he declares he is a hostile witness, then you can cross examine.

MS. COHAN: Your Honor, I would also state there are no depositions taken in this matter. In order to show the witness is hostile you have to claim surprise.

THE COURT: Well, there could be other things.

Let's proceed. We will determine that.

MR. WIENER [DEFENSE COUNSEL]: We will call Officer McGee.

Thereupon —

OFFICER CHARLES McGEE

was called as a witness by the Defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WIENER:

Q. Officer, please state your full name and occupation.

A. My name is Charles McGee. I am a police officer with the Dade County Public Safety Department.

Q. Where are you assigned to work?

A. Currently assigned to the Organized Crime Bureau, Narcotics Squad, Airport Division.

Q. Does that mean you work at the airport?

A. Primarily, yes, sir.

Q. Is part of your training to try to detect people in civilian clothes walking around the airport who you believe may be carrying contraband?

MS. COHAN: Objection. Leading.

THE COURT: I will permit it. Overruled.

THE WITNESS: My purpose at the airport is just to intercept narcotics and identify narcotic couriers, no matter what kind of clothing they are wearing or anything they are wearing.

BY MR. WIENER:

Q. They all wear civilian clothes, don't they?

A. I really couldn't answer that. So far, in my opinion, everyone I arrested has civilian clothes, I believe.

Q. Now, sir, did there come a time when Damasco Vicente Rodriguez, the defendant in the case first came into your view?

A. Yes, sir.

Q. What time was that, and what day?

A. It was September 12th, 1978 at approximately 12:40 p.m.

Q. And what was Mr. Rodriguez wearing?

A. He had an open collar shirt on, a print shirt, and I believe he had dark trousers on, possibly black. I can't remember for sure the color of the trousers.

Q. Is there anything unusual about the way he was dressed?

A. Not to my recollection.

Q. Okay, sir.

When did Mr. Rodriguez come to the airport?

A. I'm not sure. I first noticed him at the National Airlines ticket purchasing line.

Q. Now, sir, is it not a fact when you come into the airport, there are baggage handlers that check baggage as you go into the airport, but they are still

outside on the sidewalk as you pull up in your car or in a taxicab?

MS. COHAN: Objection. Leading, Your Honor.

Counsel has asked a series of leading questions. I would ask the Court at this time to admonish him.

THE COURT: Sustained.

Proceed, Counsel.

[Thereupon defense counsel presented testimony of Officer McGee]

[Thereupon the prosecutor presented the State's evidence also consisting of Officer McGee's testimony]:

MS. COHAN [the prosecutor]: Your Honor, I am prepared to rest on the hearing right now.

THE COURT: Well, it isn't up to you to rest. It is still his case.

MR. WIENER: It is the State's burden to show the defendant voluntarily submitted to the search. That shifts to you.

MS. COHAN: That's correct.

THE COURT: Okay.

MS. COHAN: I will proceed.

CROSS EXAMINATION

BY MS. COHAN [Prosecutor]:

Q. Detective McGee, have you had any special training in narcotics?

A. Yes, ma'am.

Q. Would you tell us what it is.

A. Starting when I first joined the Police Department in my academy days, the Academy gives you approximately 40 hours — about a week's worth of narcotic training.

MR. WIENER: Excuse me. I would like to object on the grounds of relevancy. We are not talking about a case here where the officer smells a substance or sees white powder.

THE COURT: She has a right to show that he is somewhat of an expert based upon his experience and training. I will overrule the objection.

MR. WIENER: An expert in what?

MS. COHAN: Narcotics investigation.

THE COURT: Investigation, police work.

THE WITNESS: After that time period I spent a year in uniform and had some contact with street narcotics sale and arrest cases through the uniform

portion of my training. After that I was assigned to the Organized Crime Bureau and Narcotics Squad.

Upon being assigned to the Narcotics Squad, I received a five-week course with the Organized Crime Bureau which encompassed approximately a week and a half to two weeks of narcotic training surveillances and the techniques and identification of drugs.

After that I took a two-week course with the Drug Enforcement Administration, an 80-hour course which I graduated from with a certificate indicating the schooling was for analysis of drugs indentification by sight, smell and of the ways and means of drug use, the transfer, sale and surveillance techniques.

I further spent a week with Nova University and another drug-related school again in identification and testing of narcotics. I had further a one-week school with the Dade County Public Safety Department in the analysis of narcotics trafficking as far as telephone analysis surveillances and the making of conspiracy cases through narcotics.

Also I have had 18 months experience with the airport unit and at this time made numerous cases in the field of narcotics as far as marijuana, cocaine, heroin and amphetamine pills. I also have had a total or approximately three and a half years in narcotics work investigation alone.

BY MS. COHAN:

Q. Pursuant to your duties at the airport, you come in contact almost on a daily basis with other

police departments, other agencies, other police personnel concerning the airport situation, don't you?

[Objection overruled]

THE WITNESS: Yes, ma'am, we do.

BY MS. COHAN:

Q. And pursuant to your duties, you have had occasion to watch passengers on almost a daily basis, don't you?

A. Yes, sir.

Q. About how many passengers do you watch on an average say?

A. Thousands.

Q. You go up and speak to thousands of passengers?

A. No, ma'am.

Q. Which passengers do you go up and speak to?

[Objection sustained]

BY MS. COHAN:

Q. Do you all day long go up and stop people and have them consent to a search of their luggage? Is that what you do?

A. No, ma'am.

Q. What do you do?

A. We make –

MR. WIENER: Objection, Your Honor, as to the relevancy about other cases. How he described his job really doesn't matter. It is what happened in this case.

THE COURT: You have a forked tongue on this issue. I am going to overrule the objection.

Answer the question.

BY MS. COHAN:

Q: What do you do?

A. We make observations at the airport based upon police experience in training in narcotics and observations made of passengers over a time period at the airport. We become accustomed to ways and means of passengers traveling through the United States via Miami International Airport. We look for things that come to our attention that would bring what I would consider a reasonable and prudent man to be suspicious.

MR. WIENER: Objection as to the conclusion, what a prudent man would do.

THE COURT: Sustained.

MR. WIENER: That is exactly what I objected to.

MS. COHAN: What he does and why he does it,

not what a reasonable and prudent man would do.

THE COURT: That's not the way the answer was coming out.

BY MS. COHAN:

Q. Detective McGee, would you tell us what you do. Complete your answer.

THE COURT: Are you considering yourself as a reasonable prudent man or what a reasonable prudent man would do under the circumstances?

THE WITNESS: I think I used the wrong word. I am not sure how I meant that. To rephrase it, I should say I look for things that to me as a constant observer of people at the airport are unusual.

MR. WIENER: Judge, I will object to that as to what he considers unusual. Who cares.

MS. COHAN: Your Honor, it is most relevant.

MR. WIENER: That's not relevant to anything. I think it's unusual.

THE COURT: I think that's a well-taken point. Sustained.

[Thereupon objections and a discussion ensued]

THE COURT: Well, I am going to listen to it, Counsel.

Go ahead.

THE WITNESS: Based upon what I observed at the airport, and it becomes suspicious in my mind and coupled with actions that I observe, anything that I see that a person would do that would be out of the normal realm.

MR. WIENER: Objection to what he considers to be the normal realm.

THE COURT: Sustained.

THE WITNESS: Or —

MR. WIENER: Excuse me, Your Honor. There were no questions pending.

MS. COHAN: Your Honor, to go back for defense counsel, the question is what he does.

THE COURT: Go ahead. What do you do?

THE WITNESS: Upon seeing certain facts that draw my attention, I then at that time as a police officer go to a person if I so feel that it warrants it, and with that, upon going to him I identify myself as a police officer and request that person if they would have any objection to talking to me. If they so submit to a conversation, the conversation ensues.

[Objection sustained; answer stricken]

BY MS. COHAN:

Q. Is the consent to which you were referring to

the consent of a citizen to speak with you on a voluntary basis?

A. Yes, ma'am.

Q. It is not a consent to search. It is a consent to a conversation?

MR. WIENER: Objection. Again, Your Honor, this is what concerns me. I don't mean to belabor the point, Judge Hickey. She is essentially taking her own witness through a nice little story.

THE COURT: He is your witness. She has got him on cross. Now, you can get him back on redirect.

MR. WIENER: All right, sir.

THE COURT: You may be able to show he is hostile on redirect. I don't know. You keep saying her witness. You called him. He is your witness. It is your motion.

Proceed.

BY MS. COHAN:

Q. The consent to which you were referring is to partaking in conversation with you similar to what a person at an airport would partake to a person like a Hare Krishna?

MR. WIENER: Objection. That's irrelevant. Normally the Hare Krishna asks if you want to buy a flower for a dime.

MS. COHAN: I am permitted to aks leading questions. If he knows the answer —

THE COURT: What do Hare Krishnas have to do with this matter?

BY MS. COHAN:

Q. Detective McGee, have you seen Hare Krishnas go up and talk to people at the airport?

MR. WIENER: Objection as to relevancy.

THE COURT: What is the relevancy?

MS. COHAN: Your Honor, this officer as a police officer has no less right to go up and engage a citizen in voluntary conversation than does a Hare Krishna.

THE COURT: I think he does have less right because his work and his duties and responsibilities and what he is attempting to do are entirely different than that of an ordinary citizen.

MS. COHAN: Not at all.

THE COURT: Well, I disagree with you. Go ahead.

I am not going to permit that answer, anyway.

BY MS. COHAN:

Q. Detective McGee, is it not a fact that when somebody tells you they do not wish to speak to you

and you have approached them on a voluntary basis, they can walk away if they so desire?

[Objection overruled]

A. Yes, ma'am, they are free to leave.

BY MS. COHAN:

Q. Have you had people previously who have said I am not talking to you, I am walking away and off they do?

MR. WIENER: Objection, Your Honor. It is irrelevant what has happened previously.

THE COURT: I really think it is irrelevant. Sustained.

MS. COHAN: Your Honor is apparently taking the position that he has less right than a normal citizen. The State does not take that position and I would also at this point object to not being able to inquire as to those matters.

THE COURT: It's in the record.

BY MS. COHAN:

Q. Do you watch any specific flights?

A. Yes, ma'am. We watch flights for target cities.

Q. Is the flight to LaGuardia a specific flight that you watch?

A. Yes, ma'am.

Q. Why is that?

A. Miami being a source city for narcotics —

[Objection overruled]

from our observations made at the airport and arrests made through somewhat of an analysis of these arrests, we have found that certain cities, major metropolitan areas such as LaGuardia is a center distribution point for narcotics. We watch flights to these certain areas more specifically than we would, say, to a place like Asheville, North Carolina or something where the flow of narcotics would be in fact greater.

BY MS. COHAN:

Q. On September 12 of 1978, you were watching the passengers on the departing flight to LaGuardia, weren't you?

A. Yes, ma'am.

Q. You observed somebody in the ticket line who subsequently became known to you as Damasco Rodriguez, did you not?

A. Yes, ma'am.

Q. Did you see Mr. Rodriguez purchase his own ticket?

A. No, ma'am.

Q. What did you see in line?

A. Mr. – my first observation of Mr. Rodriguez when he was in line, he was in possession of a brown bag that I described earlier with the zippers and the padlock, a gold-silver. He was hanging it from his shoulder. It's a suitbag. He was in line. There were approximately four or five people back in the ticket purchasing line for National Airlines. He was in possession of the baggage. As I said, the bag itself that he was holding in his hand in line, he never did set the bag down. He kept it in his possession. Directly behind him was a second gentleman. They were separated by a space that indicated that they were not, in fact, traveling together. They were separated as if to separate their existence between each other. It was a space of approximately two feet.

[Objection sustained]

BY MS. COHAN:

Q. Was there anyone else in line?

A. Yes, ma'am. There were several other people in line. I took no notice of anyone else at that time. My first notice was that the –

[Objection sustained]

BY MS. COHAN:

Q. What, if anything, drew your attention to Mr. Rodriguez?

A. The first thing that drew my attention to Mr. Rodriguez was the gold suitbag that he was in possession of. The gentleman that was directly behind him in line was also in possession of the identical same gold suitbag.

Q. What happened next concerning these two individuals?

A. Seeing the two identical bags at that time drew my observation to them to ascertain if in fact they were together. Being that the bags were exactly alike, I thought they were together, but they never had any conversation and I kept making observations of those two individuals, trying to anticipate if they were in fact together.

At the point that Mr. Rodriguez reached the head of the ticket line, and he would be the next person to proceed to the counter, there was a third gentleman that came to my view at that time. He was at the National ticket counter. He was at the last position. Mr. Rodriguez was facing the ticket counter and he would be to his extreme right. This gentleman was a — what appeared to be a Latin male, a large Latin male, and he was at that time purchasing a ticket or at least I assumed he was. The first thing that came to my observations was a large quantity of cash up on the ticket counter and then subsequent to that I saw some form of a ticket folder being passed to that gentleman.

[Objection sustained]

BY MS. COHAN:

Q. How much cash did you see? What is the thickness?

A. The bills were scattered out as I remember it on the counter. He may have had them all together at one point. I didn't personally make any observations as to the amount. It looked to me like ten to fifteen different bills, the denominations of which I don't know.

Q. After you observed what appeared to be a ticket folder handed to that individual at the counter, what did you then observe?

A. Prior to the ticket folder being handed to the gentleman at the counter, that gentleman removed himself from that ticket counter and turned and looked up and down the terminal slowly and walked over to the second gentleman, the gentleman behind Mr. Rodriguez. This gentleman subsequently was identified as Mr. Blanco. The gentleman at the counter himself was named Mr. Ramirez. Mr. Ramirez turned and walked to Mr. Blanco and leaned towards him so that his mouth was in close proximity to his ear. I could see Mr. Ramirez' mouth moving as if articulating something, at which point he then turned and walked back to the ticket counter. Mr. Blanco at that time turned and looked behind him and to each side where he could scan the complete area.

[Objections sustained].

BY MS. COHAN:

Q. After Mr. Blanco turned, did he turn his head up on his neck?

A. Yes, ma'am. His head turned in a rotating fashion with his eyes from the point I could see, his

eyes were fixed in a straight head position not showing the whites of the eyes to either side indicating he was staring out of the one corner yet turning his head indicating that his head and eyes were moving simultaneously in a sweeping motion from one side to the other throughout the terminal.

Q. What happened then?

A. Mr. Ramirez had responded to the ticket counter itself. Mr. Blanco then, after making this motion with his head as I have described, he then took one step forward again doing the same thing that Mr. Ramirez had done, placing his mouth in close proximity to Mr. Rodriguez' ear. Again, as I saw the mouth movement and at that point Mr. Blanco stepped back and assumed the position he had had. This is the first conversation I had seen. Mr. Rodriguez never turned and never looked back and never opened his mouth. He never showed any recognition of this gesture.

[Objections sustained]

[Thereupon various objections were sustained]

[By the Prosecutor]: What occurred after the observation you had made of Mr. Blanco moving his mouth in Mr. Rodriguez' ear?

A. When Mr. Blanco had returned to the position he was originally at, Mr. Blanco then drew his attention, his head turned in the direction of the gentleman, Mr. Ramirez, who was at the ticket counter.

Mr. Ramirez upon receiving the ticket folder then proceeded through the exit area which would be going past Mr. Blanco, past Mr. Rodriguez and then up through the roped area. I observed Mr. Ramirez as he proceeded past. He in no way turned his head towards either Mr. Blanco or Mr. Rodriguez. He proceeded directly on through. As he reached the end of the roped-off area where it says exit, meaning to leave the ticket purchasing counter, as he reached that area, the gentleman, Mr. Blanco, then left the ticket line and proceeded past Mr. Ramirez and past the ticket counters and exited also in that same area trailing directly behind in a few feet back of Mr. Ramirez.

Mr. Blanco at that time stood there momentarily and then still with baggage in hand he quickly turned his head from one side, from the extreme left to the extreme right and his body twisting in such a manner as to look completely back behind him.

[Objection overruled]

BY MS. COHAN:

Q. Then what happened?

A. At that point Mr. Rodriguez then left the ticket line. He was the next person to be waited on. He left the ticket line and proceeded out that same exit, that roped-off area, the same exit area and followed directly behind Mr. Ramirez and Mr. Blanco.

At this point Mr. Blanco was catching up to Mr. Ramirez and Mr. Rodriguez stayed behind them a short distance, two or three feet.

Q. What luggage did you observe in the possession of any one of those three individuals?

A. Mr. Ramirez was in possession of a leather or vinyl-leather looking suitbag with a zipper. Mr. Blanco was in possession of a small tote bag and a suit bag gold in color exactly identical to the one I described that Mr. Rodriguez had, and of course Mr. Rodriguez had the gold suitbag and bronze suitcase.

Q. Besides the transaction you observed at the ticket counter, did you observe either Mr. Rodriguez or Mr. Blanco carry on any transaction at the ticket counter?

A. No, ma'am.

Q. In fact, they never got to the ticket line while waiting at the ticket counter, did they?

A. No, ma'am.

Q. Where was Detective Facchiano while this was occurring?

A. We were both on the outside area of the ticket purchasing line. At some point we had sat down directly across from the counter. We may have gotten up and moved about. We were right in the general area where the observations were made.

Q. What happened as you were walking down the concourse, if anything, or the lobby?

A. We proceeded to follow them to Concourse F, which is a departure gate for National Airlines. We were trailing back a little ways. The two gentlemen, Mr. Ramirez and Mr. Blanco, as they reached the escalators going to the upper level, which is the security checkpoint for National, they were standing side by side on the escalator. Mr. Rodriguez then assumed the position directly behind the first two gentlemen still in possession of his luggage.

Myself and Detective Facchiano also entered the same escalator approximately four steps back from Mr. Rodriguez who was like the second step back from Ramirez and Blanco. Everyone was still in position of the same piece of luggage that I had described earlier.

The first two gentlemen, Blanco and Ramirez, were involved in conversation. I did not overhear the conversation per se. I saw the lips moving and I could overhear voice inflexion and tone, but the words I was not even trying to make out.

Q. What you overheard, did one person say something and then the other person responded?

A. Yes, ma'am. It was a conversation from one to the other and then back and forth again.

Q. Was this in Spanish or English?

A. As I said, I didn't try to overhear the words and I couldn't say.

Q. Who was talking to each other?

A. That was between Mr. Ramirez, the guy at the counter, and Mr. Blanco, the guy behind Rodriguez in line.

Q. Did these gentlemen then proceed up the escalator?

A. Yes, ma'am.

Q. What, if anything happened?

A. No conversation was exhibited between either the first two gentlemen and Mr. Rodriguez or vice-versa. Upon reaching the top of the escalator where Mr. Blanco who was at that point involved in the conversation with Mr. Ramirez looked back towards Mr. Rodriguez and then his eyes came in contact with my eyes at which time he looked at me for just a second, but at a steady stare, a steady glaze, steady eye contact.

Q. Who was that?

A. That's Mr. Blanco, the guy second in line.

Upon the stare or eye contact being broken, he turned back to Mr. Ramirez who he had been in conversation with and leaned towards him. I saw his lips moving, but you know, the tone had dropped. I couldn't hear any tone or inflection.

[Various objections and discussion]

BY MS. COHAN:

Q. What happened after that?

A. After he had the very short lip movement with Ramirez that I could no longer hear, Mr. Ramirez than turned and looked directly towards me and my partner, the same as Mr. Blanco had done. Mr. Ramirez turned back quickly. His head was moving in a very, very fast snapping motion to Mr. Blanco. Again I saw lips moving from this time.

[Objections and discussion]

THE COURT: Let's proceed.

BY MS. COHAN:

Q. After that occurred, immediately in fact, after that occurred, did Mr. Blanco then say something to Mr. Rodriguez?

A. At this point, the escalator still moving up while these two gentlemen are doing this, at this point when Ramirez had turned back, they were just at the top. They both stepped off at the escalator and walked forward. Mr. Rodriguez stepped off the escalator and took about two steps. In fact, he was just off that middle plate at the top of the escalator. I stopped dead on the escalator.

Detective Facchiano went between me and Mr. Rodriguez and proceeded towards the area where the first gentleman was who—let me try to explain this.

Ramirez and Blanco were first on the escalator. As they stepped off and proceeded towards the security

check point, Ramirez walked ahead placing Ramirez in front. Blanco was a couple of feet behind him and then Rodriguez backed two steps off the escalator approximately two, three and a half feet maybe from Blanco.

Q. Were they all in line like this?

A. Well, it was a staggered line. They weren't in perfectly a straight line, one like here, there and there (indicating). They were separate.

Q. You were closest then to Mr. Rodriguez?

A. I was directly behind him.

Q. Okay.

A. Blanco turned and looked directly at Rodriguez and he said, "Let's get out of here."

Rodriguez made no motion. He just stood there and stopped dead. I'm just standing there watching. I haven't moved.

Rodriguez with the bag in hand stood there just momentarily. I couldn't see his facial expression or anything else. Blanco looked at him. His eyes moved up causing the white area of his eyes to expand as if in an exclamation look.

MR WIENER: Objection as to—

THE COURT: Sustained.

THE WITNESS: And he said in a much lower and strained voice, "Get out of here."

At this point Mr. Rodriguez with his suitcase in hand turned and looked at me and in a very hurried motion shot to the left. It was like—I can't describe it as a run definite. It was not a walk. It's such a short area. He was moving. He never got into a run because it was a short distance.

MR. WIENER: I'll object to his conclusion that he didn't get into running. Maybe he just turned around.

THE COURT: Sustained.

THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place. You might say moving slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.

THE COURT: Did he run or walk?

THE WITNESS: Neither. He was pumping up and down.

THE COURT: You said he run up a minute ago. Did he go from a walk to pumping to a run?

THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time.

Do you understand what I'm saying?

BY MS. COHAN:

Q. Detective McGee, can you come down from the witness stand and show us.

THE COURT: Like running in place?

THE WITNESS: Sort of like this (indicating).

To demonstrate, he was stamping with his suitcase and shoulder bag when the guy told him in a strained tone to get out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet was going up and down and he was moving, but –

THE COURT: All right. Have a seat.

BY MS. COHAN:

Q. The area in which you were located has two escalators, does it not?

A. Yes, ma'am.

Q. And those two escalators both go up?

A. Yes, ma'am.

Q. There is no down escalator?

A. No, ma'am.

Q. What happened with Mr. Rodriquez?

A. After Mr. Rodriguez moved to the left to that position where the wall was, he started to go around it looking into that area. There is no exit, just walls. He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

THE COURT: Maybe that's the way he walks.

THE WITNESS: He ran to the right and went that way. He ran back and got right in front of me. He looked at me square in the face. He said, "Oh, shit."

BY MS. COHAN:

Q. You were not wearing a uniform, were you?

A. No sir, No, ma'am.

Q. You didn't have a gun exposed, did you?

A. No, ma'am.

Q. You didn't have your handcuffs exposed?

A. No, ma'am.

Q. Neither did Detective Facchiano?

A. No, ma'am.

Q. Was there anywhere Mr. Rodriguez could have gone down?

A. Yes, ma'am. There was an exit area that is not marked. There may be sign above it, but it's hard to lo :te. There is a pair of stairs going down for persons working at the airport and there's also an elevator that people can take down.

Q. Those aren't in the immediate vicinity, is it?

A. The elevator is off to the right approximately 25 to 30 feet away.

Q. Up until this point, what significance did you attach to your observations of Mr. Rodriguez?

MR. WIENER: Objection, Your Honor. This calls for a mental process. What we are looking for is an objective analysis of what he saw, and what legal significance, if any it has, what he thought in his own mind is irrelevant.

THE COURT: I have to make that determination.

MS. COHAN: Your Honor, what significance it had to this officer based on his training and experience—

THE COURT: What did he do based upon what he saw?

MS. COHAN: That's the question. Obviously it had some significance to him because he did something.

THE COURT: I think that's true, but I would have to decide that issue.

BY MS. COHAN:

Q. What happened after Mr. Rodriguez looked at you and made that exclamation?

A. At that point, I extracted my badge from my right hip and Detective Facchiano who was at this point—Rodriguez was directly in front of me as he is saying, "Oh, shit", and then Detective Facchiano—I could see him back in the area where Mr. Ramirez is and Blanco. Blanco had stood stationary while he was running back. When he came back the second time, Ramirez was telling—Blanco was telling him to go check the bag, and that's when he turned to the right and came back.

THE COURT: Blanco was saying this?

THE WITNESS: Yes, sir.

BY MS. COHAN:

Q. To whom?

THE COURT: Go check the bag?

THE WITNESS: Right.

BY MS. COHAN:

Q. I'm sorry. Were you finished with your answer?

A. No.

At that point, when he stopped in front of me and said, "Oh, shit", at that point I pulled my badge out and I saw Detective Facchiano reaching for his badge case and I extracted my badge case and I held it out and I said, "Excuse me. I'm a police officer here in Miami. Can I talk to you for a minute?"

Q. The exclamation that Mr. Rodriguez made was in English, wasn't it?

A. Yes, ma'am.

Q. Did you lay a hand on Mr. Rodriguez after this little dance that he had done?

A. No, ma'am.

Q. You just took out your badge and identified yourself?

A. Yes, ma'am.

Q. And you identified yourself as a police officer because you wanted him to be—

THE COURT: Wait a minute. Now, let's ask him what he said.

BY MS. COHAN:

Q. Exactly what did you say?

A. I held my identification out. I said, "Excuse me. I'm a police officer. Can I talk with you for a minute?" I was sort of half laughing at this point.

MR. WIENER: May the record indicate since this is twice with his unusual tone of voice that the officer is talking like he is talking to a second grader or something, and when he raises his voice—

MS. COHAN: I object to the characterization.

THE COURT: Sustained.

He used a different tone of voice. I don't know what significance it has, if any.

[Thereupon a recess was taken and the prosecution's presentation of the testimony of Officer McGee continued]:

THE COURT: All right. Everybody is ready.

BY MS. COHAN:

Q. When you held out your badge to Mr. Rodriguez and asked if he would mind speaking to you for a moment, where was Detective Facchiano?

A. He was a few feet ahead of me and right where Mr. Ramirez was and Mr. Blanco was. He was right next to Mr. Ramirez at this point.

Q. Were you the only two officers in the area?

A. Yes, ma'am, at that time.

Q. Neither of you had your guns drawn, is that correct?

A. No, ma'am.

Q. Neither of you were displaying handcuffs?

A. No, ma'am.

Q. What did Mr. Rodriguez say when you asked if he would mind speaking to you for a moment?

A. When I displayed my identification and identified myself as a police officer and everything, I asked him if I could talk to him for a moment. He said, "Yes, sir."

I don't get many yes sirs.

Q. Was your entire conversation with Mr. Rodriguez in English?

A. Yes, ma'am.

Q. Did he answer all of your questions in a coherent fashion?

A. Yes, ma'am.

Q. Did he have any difficulty with English in that he asked you to explain anything you said to him?

A. No, ma'am.

Q. In fact, what you had overheard at this point was all in English also?

A. Everything I overheard was in English, yes, ma'am.

Q. When Mr. Rodriguez said that he would speak to you, what then occurred?

A. At that point, Detective Facchiano had already identified himself to the other two gentlemen and I couldn't overhear the conversation between them, but they proceeded off to the right a little ways out of the way of traffic because it's right in front of the escalator. I asked Mr. Rodirguez if he would mind if we walked over to where his friends were. He turned and proceeded to that direction.

Q. Did you have you hand on his arm?

A. No, ma'am.

Q. Were you toucing him at all?

A. No. In fact, I placed my badge back in my pocket at this point.

Q. Did you ask over where his friends were—

MR. WIENER: Objection. The question is did you touch him. Who cares where his badge is. That's not responsive.

THE COURT: Well, he answered it. Go ahead.

BY MS. COHAN:

Q. How far away were Mr. Blanco and Mr. Ramirez from Mr. Rodriguez?

A. At the point that I asked him if he would mind stepping over where they were? I don't know. Maybe 10, maybe 15 feet away, you know. I am not sure. It was just off to the side.

Q. Why had you identified yourself as a police officer?

MR. WIENER: Objection. That calls for a mental conclusion. I cannot cross examine as to why he did something. The only question is what he did and he can give any reason and that's the reason what we're stuck with. It is a mental process.

MS. COHAN: First of all, Mr. Wiener cannot cross examine at all. Secondly, the reasons behind this officer displaying his badge are extremely relevant to this Motion to Suppress.

THE COURT: Overruled.

THE WITNESS: The reason I had identified myself as a police officer and requested to speak to him at that time was from the observations I had made. First of all, beginning when he was in the ticket purchasing line, the observations I had made of the third gentleman being Ramirez buying the ticket and the secretive passing of messages from—

MR. WIENER: Objection to the conclusion. I ask that it be stricken.

THE COURT: Sustained.

[Thereupon objections and a discussion occurred]

BY MS. COHAN:

Q. Why did you display your badge?

I'm sorry. Why did you identify yourself as a police officer?

A. I identified myself as a police office for a couple of purposes: Because the observations I had made, number one; number two, so that at the airport when we do in fact ask someone to talk to us, we properly identify ourselves so they do not think we are Hare Krishnas or someone trying to rip them off or something in that manner.

We identify ourselves as a police officer. I do so to show my respectability of the person and in fact that I would just like to hold some conversation with him.

THE COURT: Don't Hare Krishnas usually have their heads shaved?

MS. COHAN: Not anymore, no, sir. Hare Krishnas wear wigs and clothes like everybody else.

[Objection overruled]

BY MS. COHAN:

Q. Detective Facchiano displayed his badge and identified himself as well, did he not?

A. I observed him reaching for his pocket. I saw his wallet come out which contained his badge case. I cannot testify I actually saw the badge. I don't remember. That's the impression I got from Detective Facchiano.

Q. You made no attempt at all to conceal your identity as a police officer, did you?

[Objection overruled]

THE WITNESS: No, ma'am. That's the first thing I told him.

BY MS. COHAN:

Q. You were extremely polite to Mr. Rodriguez?

A. Yes, ma'am.

[Objection overruled]

BY MS. COHAN:

Q. After you identified yourself and Mr. Rodriguez had indicated that he would speak to you, how far did you and he move to be with Mr. Ramirez and Mr. Blanco and Detective Facchiano?

A. 10 to 15 feet at the most, I would say.

Q. Is the area in which you were standing open to the public?

A. Yes, ma'am.

Q. Were there other members of the public in the area?

A. Yes, ma'am. There were people coming up the escalators behind us and passing us by.

Q. At that point when you moved to Mr. Ramirez and Mr. Blanco, what occurred?

A. When I moved over towards their direction and Mr. Rodriguez assumed the position with them, you know, I mean he joined the other two gentlemen and John and I were standing there. I asked Mr. Rodriguez at that time, "Would you have any identification? Do you mind showing me some identification? Do you have an airlines ticket?" He said – meaning Rodriguez said, "I don't have any." At the same time the guy known to me as Ramirez handed me an airlines ticket and I at that time looked at the airlines ticket. It was an airlines ticket 45136, La Guardia, National Airlines. It was in the name of Martinez, Perez and Rodriguez.

Q. Three people?

A. Yes, ma'am. It was a group ticket, group of three.

Q. Did it indicate the method of payment for that?

A. It was a cash ticket.

Q. Was your primary conversation with Mr. Rodriguez?

A. Yes, ma'am. That's who I initiated my conversation with.

Q. In fact, Detective Facchiano was talking to Mr. Ramirez and Mr. Blanco?

A. I know he was talking to Mr. Ramirez. Mr. Blanco was sort of left alone at this point. No one was directing any conversation to him.

THE COURT: Mr. Ramirez is the one that handed you the airline ticket?

THE WITNESS: Yes, sir. The one who purchased the ticket.

THE COURT: And he handed it to you once you asked Mr. Ramirez?

THE WITNESS: Right. As he was talking. When I asked Mr. Ramirez about the identification of the ticket, Mr. Ramirez handed me the ticket without me saying anything to him.

BY MS. COHAN:

Q. In what tone of voice was this conversation being carried on?

A. Just a normal tone.

Q. You had not raised your voice to attract attention?

A. No, ma'am.

Q. Is that correct?

A. No, ma'am.

Q. When you observed the contents of the airline ticket to LaGuardia, did anything occur with respect to it?

A. Looking at the ticket, I asked Mr. Rodriguez, "What's your name?" He said, "Rodriguez." I turned to Mr. Blanco and I said, "What's your name?" So he said, "Rodriguez." I asked, "Wait a minute. There's only one Rodriguez."

[Objection and discussion]

THE COURT: From the officer's testimony, there were two Rodriguezes, apparently. This man identified himself as Rodriguez. Apparently that was the correct identification. I don't see if there is anything amiss there. Let's proceed.

BY MS. COHAN:

Q. After the second individual identified himself as Rodriguez also, did you say anything about that?

A. I said, looking at the picture, I said, "Wait a minute. I don't understand something. There is only one Rodriguez on this Ticket." Then Mr. Rodriguez and the gentleman, Mr. Blanco, who had said his name was Rodriguez looked at each other and neither one said anything. Then I asked Mr. Blanco, "Well, do you have any identification that I could see?"

He said, "No, I don't have anything."

I said, "You don't have anything?"

MR. WIENER: I object to this as being hearsay. It involves a third party. There is no evidence showing my client was in the presence or heard it. I don't understand the relevance of it. Again, these other people were not charged. I cannot control what other people do or say.

THE COURT: Sustained.

BY MS. COHAN:

Q. The other two names on the ticket besides Rodriguez were Martinez and Perez, is that correct?

A. Yes, ma'am.

Q. Did you ever get any identification from Mr. Blanco?

A. Yes, ma'am.

Q. Did that identification which you obtained from Mr. Blanco have the name Blanco or one of the names Martinez or Perez?

A. It had the name Blanco.

Q. What was the physical condition of Mr. Rodriguez during the course of these events?

A. During the course of these events from the point that I had identified myself and at the time we were ensuing conversation as far as identification and everything, Mr. Rodriguez had sat the suitcase down on the floor, and I think there was a chair there. I think he hung the gold bag over the chair, and while he was standing there he was sweating profusely, shaking extremely; extremely shaking, and when I was asking him, you know, as to his identification, his voice was showing great strains of stress.

MR. WIENER: I would object to that, unless this man is an ears, nose and throat specialist.

THE COURT: Sustained.

MS. COHAN: He can testify as to what he heard.

MR. WIENER: He cannot testify as to what is strained.

THE COURT: With the omission of the word "strained".

Will you continue, please.

THE WITNESS: The voice was altering between pitches as far as high pitch to low pitch.

BY MS. COHAN:

Q. What was the temperature in the airport on September –

[Discussion]

THE COURT: I could rule at this point there was no reason to stop this man and for the sake of argument, I am not determining as a matter of fact at this point, but for the sake of argument I could say it was an illegal stop and there was no probable cause for an articulable fact or reasonable founded suspicion to stop this man, but that still doesn't visciate necessarily what occurred thereafter. So, let's go from that point.

MS. COHAN: Thank you, Your Honor.

BY MS. COHAN:

Q. What was the temperature in the airport on September 12, 1978?

A. I don't know. It was air conditioned.

Q. Were you comfortable?

A. Yes, ma'am.

Q. It wasn't warm in there?

A. Not to me.

Q. Were you wearing a jacket?

A. Yes, ma'am.

Q. On September the 12th?

A. Yes, ma'am.

[Objection sustained]

BY MS. COHAN:

Q. What happened after the names on the ticket were examined and Mr. Blanco produced identification in the name of Blanco?

A. There was — I said something about — I guess you forgot about this piece of identification. Blanco did not respond with any kind of an answer or anything.

[Objection overruled]

THE WITNESS: Blanco made no remark.

BY MS. COHAN:

Q. At that point or in that time frame, did you then advise the three individuals, Mr. Blanco, Mr. Rodriguez and Mr. Ramirez as to your purpose of being in the area?

[Objection overruled]

BY MS. COHAN:

Q. Did you advise Mr. Ramirez, Mr. Rodriguez and Mr. Blanco as to your purpose for being in the airport?

A. Yes, ma'am. At that point John received some identification from Ramirez and John started the conversation. We are still talking —

[Objection sustained]

BY MS. COHAN:

Q. Did you and Detective Facchiano advise as to your purpose in the area?

A. Yes, ma'am.

Q. What did you say?

A. My words specifically are going to be intermingled with Detective Facchiano's because both of us were talking simultaneously. The indications were that we were officers working at Miami International Airport and that we had a real problem with contraband going through the airport. I further backed that up saying we were narcotics officers and that was our job, to look for narcotics.

Q. Had you at this time asked anybody for a consent to search luggage?

A. No, ma'am.

Q. After you advised them of your purpose, what happened?

A. I made some statement to Mr. Rodriguez about the display of his movements upon coming off of the escalator. I advised him that it caused me some concern from my observations and I asked him at that time, "So would you have any objection if I searched your luggage?"

He said, "I don't."

The suitcase was down on the floor. I am pointing down to the suitcase. He says, "I don't have a key."

Before I could say anything else, Ramirez was watching me at that point and Ramirez said to Rodriguez, "Let him look."

Rodriguez reached in his pocket and extracted a key. It was loose. It wasn't on a key chain or anything. He handed me a key which I placed in the lock and opened it.

Q. Did you demand that Mr. Rodriguez consent to search of his luggage?

A. No, ma'am. I asked him if he had any objections. He said, "I don't have a key."

Q. Did you tell him anything such as he didn't have a choice in the matter?

A. No, ma'am.

Q. At this point, had Mr. Ramirez' luggage been examined?

A. Mr. Ramirez' luggage was in the process of being examined by Detective Facchiano. Ramirez was watching me. He was the one that answered to open the bag, telling Rodriguez to.

Q. Were there other officers around the three individuals and you and Detective Facchiano?

A. At some point in time, the PSO, the uniform officer that works the security check point came to our location, Officer Slimp, at which point — I am not exactly sure, but it was sometime right in this time frame and I am not sure, but it was just prior to the actual search or just after.

Q. After Mr. Rodriguez was told to go ahead and let you look, from where did he take the key?

A. From his pocket, front pocket.

Q. Where was Mr. Rodriguez in relation to his suitcase?

A. He was standing directly behind it. Like it was laying in front of him on the floor.

Q. What did you do with that key?

A. I took the key. I went down and I opened the suitcase at that point.

Q. What did you find, if anything?

A. There was some articles of clothing and there was a pillow case. Inside the pillow case when I pulled the pillow case open, there were two bags of cocaine, approximately three and a half pounds, and it was like a zip-lock bag. The other one was wrapped up in like a blue adhesive paper-like.

Q. What happened next?

A. I stood up and I said, "John." John looked over. I showed him the cocaine. I dropped it back in the suitcase. I stood up and reached in my back and grabbed my handcuffs and told Mr. Rodriguez, "Turn around and place your hands against the wall. You're under arrest."

At that point Blanco started walking towards me. He said, "Wait a minute." He started saying something. I said, "Hold it right there." Turn around and put your hands against the wall.

He started to go to me. I had a guy I was trying to arrest and I didn't know what was going on.

Q. You had three of them?

A. John made some indication that he was a black belt in karate.

MR. WIENER: Objection as to the relevance.

THE COURT: Sustained.

BY MS. COHAN:

Q. When you told Mr. Rodriguez to turn around and put his hands up against the wall, did you touch him at that point?

A. No.

Q. When was the first time that you touched him?

A. After he and Blanco had both turned and assumed the position against the wall.

Q. Was the first order that you gave to Mr. Rodriguez to turn around and face the wall?

A. As far as I can recall, I told him to turn around, put your hands against the wall. You're under arrest.

Q. Prior to your discovery of the three and a half pounds of cocaine in his luggage, was Mr. Rodriguez free to leave?

A. Yes, ma'am.

Q. After you placed Mr. Rodriguez under arrest, did you handcuff him?

A. Yes, ma'am.

Q. Was this the first time you removed your handcuffs?

A. Yes, ma'am.

[Subsequent questions and objection sustained]

BY MS. COHAN:

Q. As far as Mr. Ramirez is concerned, was he in any way being employed by the Dade County Public Safety Department in order to get Mr. Rodriguez to go ahead and consent to the search.

A. No, ma'am.

Q. This is the first time you had ever seen Mr. Ramirez?

A. First time ever I had ever seen any of them.

Q. Nobody had told Mr. Ramirez to tell Mr. Rodriguez —

MR. WIENER: We will stipulate Ramirez was not working for the Public Safety Department to save some time.

BY MS. COHAN:

Q. Pursuant to Mr. Rodriguez being placed under arrest, was he advised of his Miranda Rights?

A. Yes, ma'am. Detective Facchiano advised him of his Miranda Rights from his Miranda card. We went downstairs and placed him in the vehicle with the evidence and transported him to Station 3 at which time he was read his Rights.

Q. Was that done in your presence?

A. Yes, ma'am. I was driving the car.

Q. Do you know if that was done from the Miranda card that Detective Facchiano carries with him?

A. Yes, ma'am.

Q. Did Mr. Rodriguez indicate that he understood his Rights?

A. Yes, ma'am.

Q. Did he say anything?

A. Yes, ma'am. He said at that time the other two guys are not involved. He said, "It's my dope. I am not going to get those other guys involved."

He says, "I don't want to say anything else."

Q. About how long had you been in conversation with Mr. Rodriguez prior to finding the cocaine from the time you first said excuse me, I'm with the Public Safety Department until you found the cocaine? How long a time is that?

A. Two to three minutes, I would say. It was a short period.

Q. Did you or Detective Facchiano ever strike Mr. Rodriguez?

A. No, ma'am.

Q. Did you ever threaten him in any way?

A. No, ma'am.

[After additional testimony of Officer McGee, the Court heard argument of defense counsel]

MS. COHAN [the prosecutor]: May it please the Court, first of all, as far as the Terry Frisk which Mr. Wiener referred to, as the Court may be aware, the Terry test is two-fold. They ruled on two separate and distinct issues. One was a stop and the other was a frisk.

Also, the Supreme Court in *Terry vs. Ohio* included language that a police officer is free to walk up to a citizen on the street and to engage that officer in voluntary conversation. That is followed by the *United States versus Wiley.* That is also followed by Windfall from the Third District and also followed by *State versus Price* from the Fourth District.

Even assuming that the Court rules this was an illegal stop, the State is traveling under the theory this was a free and voluntary consent in that the defendant was always told that he had a choice. He was asked if he minded if he spoke with the officers. He could have said yes, I mind, and walked away.

THE COURT: That has to do with the stopping.

MS. COHAN: Your Honor, it affects the consent. The defendant was also asked would you have any objection, any objections to consenting to a search of your luggage. It was at that point that he said, "I don't have a key." What that reveals –

THE COURT: Well, it does not – you might imply consent, but it does not give consent.

MS. COHAN: That is correct.

THE COURT: I mean, in vitiation it doesn't.

MS. COHAN: However, through his own actions, the defendant consented to a search and he did that by voluntarily pulling out of his pocket where it was concealed from the officers a key to the padlock of his luggage and handing that key over to the officers.

I think it will be stretching the imagination beyond the breaking point to say that that did not indicate to the officers that the defendant had consented to a search of his luggage. Why else produce a key from a concealed location to a padlock of a suitcase unless one is consenting? Defense Counsel would have you believe there is no attenuation here. Once an initial illegal stop has been made – first of all, the State will not concede that the stop was illegal. Secondly, by the officer asking if the defendant had any objections that certainly acts as enough of an attenuation to remove any taint which the Court may have found was the result of an initial unlawful stop.

Thirdly –

THE COURT: You mean you have any objection to what? I'm not quite certain I understand what you're referring to. I understood that the officers said he asked them if he could look in the bag.

MS. COHAN: The officer asked, if you will recall the testimony, do you have any objection if I search your suitcase?

THE COURT: Right. Okay.

MS. COHAN: Another argument has been made to the Court that there is not enough of a time break as far as minutes between the initial contact with the defendant and the subsequent consent. It has never been a requirement of the law that any time break occur between an initial conversation and a subsequent consent. That is simply not a requirement of *Scheckloff vs. Bustamente* or any succeeding case.

For that I would cite *United States vs. Venike*, 449 Fed. 2nd, 91. I would also cite United States versus Troutman and I have supplied Husted versus State to the Court.

Under the totality of the circumstances in this case, that includes the stipulation by the defense attorney that Mr. Ramirez was in no way acting on behalf of the police department when he told the defendant to go ahead and let him look. No contraband was found in Mr. Ramirez' luggage. He had nothing to find and whether or not he influenced the acts of Mr. Rodriguez has no bearing upon what the State must be required to prove was an act free of police coercion and free of authority that the police might have provided to get Mr. Rodriguez to consent to the search. In fact, the State would suggest that it has sustained its burden of proving that the defendant did, by clear and convincing evidence and freely and voluntarily volunteer to a consent of his luggage.

[Thereupon the court heard argument of defense counsel]

THE COURT: I am going to grant the motion for this reason: I do not think that there has been a

sufficient showing by the State that the consent was completely untainted and freely and voluntarily given; that the defendant was never told that he had the right to leave. He was never told that. He had the right to refuse to have his baggage searched and that he never verbalized a consent to the search of his luggage. I do not believe that the intervening statement by a companion to let him look is sufficient in the time frame that occurred here to overcome the taint of the lack of showing that this man had a right to refuse the search of his luggage or he had a right to leave, and therefore under the totality of the circumstances, I am going to grant the motion.

If you will prepare an Order on it, I will sign it.

MR. WIENER: All right.

[FILED MAY 22, 1979]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, CRIMINAL DIVISION,
SPRING TERM, 1979

CASE NUMBER 78-13968

STATE OF FLORIDA,

Plaintiff,

vs.

DAMASCO VICENTE RODRIGUEZ,

Defendant.

ORDER

THIS CAUSE having come before the Court on May 10, 1979, for hearing on the Defendant's Motion to Suppress, and the Court having reviewed said Motion, having heard testimony, received evidence, and the Court having heard argument of counsel and being otherwise fully advised in the premises it is the finding of this Court that:

1. There was no reason to stop the Defendant, Demasco Vicente Rodriguez. The Defendant did nothing which would arouse an articulable suspicion in the eyes of Detective McGee and Detective Facchiano.

2. Due to the lack of telling the Defendant he had a right to leave, and the lack of telling the Defendant he had a right to refuse to consent to a search, there was an insufficient showing that the consent herein was completely untainted due to the lack of the two things previously mentioned.

3. The statement made by the Defendant's companion did not overcome the taint from the initial illegal stop of the Defendant.

WHEREFORE it is hereby ORDERED and ADJUDGED that the Motion shall be and the same is hereby granted.

DONE AND ORDERED in open court on this 22nd day of May, 1979, at Miami, Dade County, Florida.

/s/ Richard Hickey

RICHARD HICKEY
JUDGE, CIRCUIT COURT

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 79-1138

THE STATE OF FLORIDA,

Appellant,

vs

DAMASCO RODRIGUEZ,

Appellee,

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 9.210 (g), the State of Florida files this notice of the following supplemental authorities;

1. *United States v. Mendenhall*, ___ U.S. ___ (No. 78-1821 Decided May 27, 1980).

2. *State v. Bell*, 382 So.2d 119 (Fla.3d DCA 1980).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1980

CASE NO. 79-1138

THE STATE OF FLORIDA,

Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,

Appellee.

Opinion filed September 23, 1980.

An Appeal from the Circuit Court for Dade County, Richard S. Hickey, Judge.

Janet Reno, State Attorney and Ira N. Loewy, Assistant State Attorney, for appellant.

Jack R. Blumenfeld; Spain & O'Donnell, for appellee.

Before BARKDULL, HENDRY and SCHWARTZ, JJ.

PER CURIAM.

Affirmed on the authority of *State of Battleman*, 374 So.2d 636 (Fla.3d DCA 1979).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NUMBER 79-1138

THE STATE OF FLORIDA,
Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,
Appellee.

MOTION FOR REHEARING

Pursuant to Fla.R.App.P. 9.330, the Appellant in this cause files this motion for rehearing of this Court's decision filed on September 23, 1980, and as grounds for rehearing says:

1. In affirming the trial court's order suppressing evidence in this case, this court has overlooked its prior decisions in *Myles v. State*, 374 So.2d 83 (Fla. 3d DCA 1979) and *State v. Mitchell*, 377 So.2d 1006 (Fla. 3d DCA 1979), in which this court held that while a conformance, *without more*, to one or more elements of the drug courier profile does not amount to articulable suspicion,[1] the existence of certain profile characteristics in conjunction with other specific objective facts which the officer knows from experience are associated with criminality[2] will be sufficient to create a founded suspicion

---

[1] *See also Royer v. State*, case no. 78-1050 (Fla. 3d DCA September 9, 1980) (en banc), rehearing pending, n 6 at 4 slip opinion of court

[2] *See Royer v. State*, *supra*. n. 4 at 3, slip opinion of court.

of criminal activity so as to warrant the intrusion of an investigative stop.

2. This Court has also overlooked the fact that unlike the case of *State v. Battleman*, 374 So.2d 636 (Fla. 3d DCA 1979), in which the investigatory stop of the defendant was based solely upon three (3) of the profile characteristics,[3] the investigatory stop of the defendant in the case at bar was based upon several other specific, articulable, objective facts, which indicated to the officers that the defendant was engaged in criminal activity. These facts included, in addition to several of the "profile" characteristics observed by the officers at the time the defendant and his companion purchased the defendant's airline ticket (T. 9-10, 40-48), 1. that upon recognizing the undercover officers to be policemen the defendant's companion Blanco told him twice to "Get out of here" (T. 51-52); 2. that the defendant attempted to flee the presence of the officers (T. 52-56); and 3. that upon realizing that there were no readily accessible exits the defendant stopped in front of one of the officers and said "Oh, shit." (T. 56).

3. This Court has also overlooked its holding in *State v. Bell*, 382 So.2d 119 (Fla. 3d DCA 1979), that "flight from police evidences guilt" *Id.* at 119-120, and that evidence of flight, coupled with other conduct of the defendant will afford police officers with other conduct of the defendant will afford police officers their

---

[3]In *Battleman*, the stop of the defendant was based *solely* upon "the fact that Battleman seemed nervous; he had arrived from San Francisco with one of the same bags; and his ticket showed that he had paid for it in cash." *Id.* at 637.

articulable founded suspicion necessary to stop and detain an individual as contemplated under *Terry v. Ohio*, 392 U.S. 1, 99 S.Ct 1868, 20 L.Ed 2d 884 (1968). *Id.* at 120. In *Bell, supra* this court cited with approval the decision in *United States v. Pope*, 561 F. 2d 663 (6th Cir. 1977), which upheld an investigatory stop and detention in an airport based upon evidence that the defendant met some of the "profile" characteristics coupled with evidence of flight.

Respectfully submitted,

JIM SMITH
Attorney General

JANET RENO
State Attorney

By /s/ Ira N. Loewy
IRA N. LOEWY
Assistant State Attorney
1351 Northwest 12th Street
Miami, Florida 33125
(305) 547-5200

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1980

MONDAY, OCTOBER 27, 1980

CASE NO. 79-1138

THE STATE OF FLORIDA,

Appellant,

vs.

DAMASCO VICENTE RODRIGUEZ,

Appellee.

Counsel for appellant having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy

ATTEST:

/s/ [Illegible]
Clerk District Court of
Appeal, Third District

cc: Ira N. Loewy
Jack R. Blumenfeld
Spain & O'Donnell

/plc

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1980

WEDNESDAY, DECEMBER 10, 1980

CASE NO. 79-1138

THE STATE OF FLORIDA,
Appellant,

vs

DAMASCO VICENTE RODRIGUEZ,
Appellee,

Counsel for appellant having filed in this cause motion to stay mandate for 60 days, it is ordered that said motion is granted and the mandate is hereby stayed for a period of 60 days from date hereof.

A True Copy

ATTEST:

/s/ Louis J. Spallone
Clerk District Court of
Appeal, Third District

cc: Ira N. Loewy
Jack R. Blumenfeld
Spain & O'Donnell

/plc